

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.1147 OF 2018

Prasad Dilip Pathade.] ... Appellant /
 (Orig. Accused)

Versus

1. The State of Maharashtra.]
 2. Jayashree Yeshwant Bhalerao.] ... Respondents
 (R-2 Orig. Complainant)

Mr. Aniket Nikam a/w Mr. Ashish Satpute i/b Mr. Vivek Arote for Appellant.

Mr. V. B. Konde-Deshmukh, APP for State - Respondent No.1.

Mr. Ganeshlal A. Kataria for Respondent No.2.

CORAM :- INDRAJIT MAHANTY &
SARANG V. KOTWAL, JJ.

RESERVED ON :- FEBRUARY 12, 2019

PRONOUNCED ON :- FEBRUARY 13, 2019

P. C. :-

1. The present Appeal is preferred by the Appellant against the order passed by the learned Additional Sessions Judge-2, Malegaon, Nashik, on 15th September, 2018 in Criminal Bail Application No.487 of 2018. The Appeal is preferred under the provisions of Section 14A(1) of The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 (hereinafter referred to as 'the Atrocities Act'.)

2. The FIR vide C.R.No.I-163 of 2018 was registered at Manmad City Police Station, District Nashik, under Section 376(2)(n) of the IPC and under Section 3(1)(w)(ii) of the Atrocities Act. The FIR was lodged by the prosecutrix who was aged 21 years as mentioned in the FIR.

3. It is mentioned in the FIR that the prosecutrix was studying at Mungase, Taluka Malegaon, District Nashik between 2015 to 2017. While she was in college, the Appellant contacted her and proposed to have love affair with him. The prosecutrix told him that she wanted to concentrate on her education and that she was not interested. It is mentioned in the FIR that she clearly told him that she belonged to Mahar caste and the Appellant was belonging to a different caste and therefore, his parents would be objecting to their marriage. Even after the prosecutrix mentioned this to him, he insisted that he would look after the prosecutrix. The Appellant deliberately increased their interactions. It is the prosecutrix's case in the FIR that the Appellant had assured to marry her and was treating her as his future wife. It is the case of the prosecutrix that based on such promise, he developed physical relations with the prosecutrix

and they had sexual intercourse at different places on different occasions. Even after her education was completed and when she was working at Malegaon, the Appellant used to visit her. The prosecutrix started asking him about their marriage. However, the Appellant started avoiding the subject. He stopped using his mobile phone number. The prosecutrix, time and again asked him about their marriage but he refused. On the basis of such facts, the prosecutrix lodged her FIR on 09/09/2018. The FIR was lodged under the aforementioned sections.

4. We have heard Mr. Aniket Nikam, learned Counsel for the Appellant and Mr. V. B. Konde-Deshmukh, learned APP for State.

5. Mr. Aniket Nikam, learned Counsel for the Appellant, submitted that from the allegations in the FIR, it is clear that the sexual intercourse took place with consent of the prosecutrix and there was no force involved. The prosecutrix was an adult and therefore, no offence under Section 376 of the IPC and Section 3(1)(w)(ii) of the Atrocities Act was made out against the Appellant and therefore, there was no impediment in granting the relief of

anticipatory bail to him. Mr. Nikam relied on the Judgment of the Hon'ble Supreme Court in the case of *Uday Vs. State of Karnataka reported in AIR 2003 Supreme Court 1639* and on an *order dated 13th July 2007 (in Criminal Writ Petition No.363 of 2007) passed by a learned Single Judge of this Court at Nagpur Bench in the case of Ashok Bapurao Thorat Vs. The State of Maharashtra & Another.*

6. Mr. V. B. Konde-Deshmukh, learned APP for State, opposed the anticipatory bail application on the ground that the offence was made out and there was bar under the provisions of the Atrocities Act to grant such relief.

7. We have considered the submissions made by the learned Counsel for both parties.

8. To come out of the clutches of the definition of rape under the IPC, it is necessary for the Appellant to establish that consent of the prosecutrix was not given under some misconception of facts. Section 90 of IPC mentions thus :

“90. Consent known to be given under fear or misconception.-- A consent is not such a consent as it intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception or;

.....
.....”

It is the case of the prosecutrix that she always believed that the Appellant would keep his promise and based on the assurances, she had given her consent for keeping physical relations with him. The FIR also mentions that she, in no uncertain terms, had told him that she belonged to Mahar caste and he was belonging to a different caste. Therefore, the Appellant was well aware of his act. Finally, his refusal to keep his promise to get married, has resulted into lodging of the FIR.

9. The Judgment in the case of Uday (*supra*) deals with a case where the Hon'ble Supreme Court considered the circumstances and situation in which the consent was given by the prosecutrix. However in that case, the trial was completed and the observations were in respect of the evidence before the Court. In the present case

before us, the trial is yet to commence and whether the consent was given under misconception of facts or otherwise, can only be established after the evidence is recorded. The offence assumes seriousness because the prosecutrix was belonging to the caste covered under the Atrocities Act and the Appellant was well aware of such fact right from the beginning.

10. In Ashok's case (*supra*), the only consideration before the Court was about the applicability of Section 3(1)(xi) of the said Act as it stood then. In the present case, Section 3(1)(w)(ii) is applied. However, reading of the allegations in the FIR makes it a case under Section 3(2)(v) of the Atrocities Act. The said Section reads thus :

“3(2) Whoever, not being a member of a Scheduled Caste or a Scheduled Tribe,--

(v) commits any offence under the Indian Penal Code (45 of 1860) punishable with imprisonment for a term of ten years or more against a person or property (knowing that such a person is a member of a Scheduled Caste or a Scheduled Tribe or such property belongs to such member), shall be punishable with imprisonment for life and with fine.”

*(va)
(vi)
(vii)”*

Since in the present case, Section 3(2)(v) is clearly attracted (though it is not specifically mentioned in the proforma of the FIR) as distinct from the cited case, we are barred from exercising any jurisdiction or granting relief under Section 438 of the Cr.P.C., in view of the bar mentioned in The Scheduled Castes and The Scheduled Tribes (Prevention of Atrocities) Amendment Act, 2018 and in particular Section 2(2) thereof.

11. In view of the express bar noted hereinabove in exercising our jurisdiction for grant of anticipatory bail, we are not inclined to entertain the present Appeal and it is accordingly dismissed. The prayer for anticipatory bail made by the Appellant is consequently rejected.

(SARANG V. KOTWAL, J.)

(INDRAJIT MAHANTY, J.)